Filed 2/6/03 The Fred Rappoport Co. v. Trigg CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE FRED RAPPOPORT COMPANY, Plaintiff and Appellant, v. ELLYN TRIGG et al., Defendants and Appellants.	B155513 (Super. Ct. No. BC218036)

APPEAL from a judgment of the Superior Court of Los Angeles County. George H. Wu, Judge. Reversed with directions.

Leonard, Dicker & Schreiber, Richard C. Leonard and David N. Schultz for Plaintiff and Appellant.

Law Offices of Jan Stanley Mason and Jan Stanley Mason for Defendant and Appellant Ellyn Trigg.

Potter, Shanley & Shanley and Barry W. Shanley for Defendant and Appellant Elmo Shropshire.

____

Plaintiff The Fred Rappoport Company appeals from a judgment following a court trial in this declaratory relief action to interpret the merchandising provisions of a licensing agreement. Rappoport entered into the agreement with defendants Ellyn Trigg, individually and as the representative of the Estate of Bill Trigg (both doing business as Kris Publishing), and Elmo Shropshire, individually and doing business as Elmo Publishing (collectively the Publishers). Under the agreement, Rappoport received the exclusive right to produce an animated program based on the song "Grandma Got Run Over By A Reindeer," as well as certain merchandising rights. The trial court found that the merchandising provisions of the agreement were ambiguous and the extrinsic evidence showed the parties interpreted the provisions differently at the time they entered into the agreement. However, because Rappoport had performed under the contract by producing the animated program, the trial court devised a system for the parties to share the merchandising rights at issue. On appeal, Rappoport contends: (1) the parties' agreement unambiguously gave Rappoport the exclusive right to merchandise the song, including the right to license a generic stuffed reindeer toy that could play the song; (2) the trial court's interpretation of the agreement is not supported by the extrinsic evidence; (3) the provisions of the judgment governing merchandising of other products are unsupported by the agreement; and (4) the judgment is internally inconsistent, irreconcilable, and unintelligible.

The Publishers also appeal from the judgment, contending: (1) the agreement is unambiguous and does not give Rappoport the exclusive right to merchandise the song; (2) even if the agreement is ambiguous, extrinsic evidence supports finding that Rappoport does not have the exclusive right to merchandise the song; and (3) the portions of the judgment devising a system to share merchandising rights must be reversed. We conclude the agreement is unambiguous and does not provide Rappoport exclusive merchandising rights in the song. Therefore, the judgment is reversed with directions.

FACTS

The Negotiations

The Publishers own the rights to the song "Grandma Got Run Over By A Reindeer." The Publishers employ Integrated Copyright Group (ICG) as their agent for licensing. ICG administers the copyright for the Publishers. Rappoport is an independent television production company. In the early 1990s, Rappoport contacted the Publishers to discuss developing an animated program based on the song. The parties engaged in extensive, prolonged negotiations.

Merchandising rights were heavily negotiated. In September 1993, ICG drafted a proposal which provided Rappoport with all of the merchandising rights for characters and character drawings that Rappoport created. Under this proposal, the Publishers would receive five percent of the net profits from merchandising of characters and artwork created for the program. However, the Publishers specifically retained the right to license any other merchandising efforts based on the song that were creations unrelated to Rappoport's program, characters, and drawings, such as a children's pop-up book. ICG suggested the Publishers might provide Rappoport protection against merchandising of products similar to products Rappoport had already marketed.

Rappoport responded that the Publishers should have no right to merchandise or license the song or the characters in the song irrespective of whether they were related to the material created for the program. He would allow a limited right to license the song in the normal course of business for records, commercials, and similar uses, as long as there was no dramatic use of the plot or the characters in the song as part of the license. Rappoport's proposal required the Publishers to obtain prior written approval from Rappoport before licensing any commercial use of the song in order to avoid conflicts and protect Rappoport's exclusivity of merchandising.

On November 10, 1995, Shropshire sent Rappoport a letter stating that a decision would be made about an animated special within the week. However, Shropshire stated that for Rappoport's proposal to be considered, Rappoport needed to match a competitor's proposal. The competitors proposal provided the Publishers with a greater share of the net proceeds from merchandising. The competitor's proposal also specifically gave the competitor exclusive merchandising rights in the song. Rappoport sent a proposal that matched the competitor's proposal concerning the share of net proceeds, but was otherwise identical to his previous proposal.

On November 20, 1995, ICG informed Rappoport that the Publishers would not agree to the requirement that Rappoport approve any deals for commercial uses of the song. On February 20, 1996, ICG sent a proposal that provided Rappoport with the exclusive dramatic rights and synchronization license for audio/visual programs based upon the song.[1] The Publishers would retain the right to license the song in their normal

---

1 In the trial court's statement of decision, the trial court describes the types of licenses that a copyright owner can confer as follows: "As explained in [Kohn & Kohn, Kohn On Music Licensing (2d ed. 1996) pages 84-86]: [¶] Music used in sound recordings, and distributed in compact discs and audiocassettes, is permitted by the grant of what is known, for historical reasons, as a *mechanical license*, and these generate *mechanical royalties*. Music that is publicly performed on, for example, radio and television, is generally permitted under a *performance license* issued to the user on a *blanket* basis by a *performance rights society*, which pays *performance royalties* to songwriters and music publishers. Music that is embodied in copies of motion pictures for theatrical distribution generate *synchronization royalties*, the licensing for which is granted in a *theatrical synchronization license*. Music that is embodied in copies of television programs for television broadcast also generate *synchronization royalties*, the licensing for which is granted in a *television synchronization license*. [¶] Music used in *sheet music*, *music folios*, and other printed copies of music is permitted by the grant of a *print license* and these generate *print royalties*. [¶] . . . [¶] When music is embodied in a music box or similar musical product, such as a talking doll or singing greeting card, a *music box license* or *consumer musical product license* is required. [¶] Though rarely a significant source of publishing income, a *dramatic performance license* is required by anyone who wishes to render a dramatic performance of a song — that is, when the song is used to carry forward the plot or story of a dramatic work, such as a motion picture, television program, or theatrical play. [¶] Finally, if you desire to produce a course of business, except for products which included any dramatic use of the plot or characters as part of the license. Under the proposal, Rappoport would have "the exclusive right to merchandise material from the Programs." From merchandising income, Rappoport would be entitled to a specified fee and expenses. The remaining income from merchandising would be split equally with the Publishers.

After discussions with Rappoport, ICG added a paragraph to the merchandising provision of the agreement clarifying that the Publishers would share in income from products based on characters created solely by Rappoport only if the products were sold in connection with a character original to the Publishers or the marketing of the product used the title of the song.

The Executed Agreement

On May 7, 1996, the parties executed the agreement prepared by the Publishers. The agreement provided an option period: upon execution of the agreement and receipt of $1,500, the Publishers granted Rappoport the exclusive right to seek the creation, production, and licensing of an animated motion picture based on the song through May 31, 1998. At any time during the option period, Rappoport could pay an additional $14,500 to automatically initiate an exclusive rights period. Two paragraphs of the exclusive rights period are relevant to this declaratory relief action: paragraph 3 concerning exclusive dramatic rights and paragraph 7 concerning merchandising rights.

Paragraph 3 of the agreement provides: "RIGHTS. Upon execution of the Exclusive Rights Period, Publishers shall grant to [Rappoport] the exclusive dramatic rights and synchronization license to the Song for any television, or any other

---

dramatization of a musical composition, or more accurately, its lyrics (i.e., much like one would produce a motion picture adaptation of a novel or short story), you would require a *dramatic adaptation license*."

audio/visual presentation, theatrical, or film presentation/programs based upon the song. These rights extend to all media existing or hereafter existing for the purposes of exploitation and promotion of the presentation/programs. [¶] None of the Rights granted to [Rappoport] herein shall be restrictive to Publishers in their normal business of licensing the Song for mechanical recordings (cassettes, compact discs, or other recorded media), synchronization rights (video, films, television programs, commercials, etc.), performance royalties, print royalties, or any other royalties, as long as such royalties are not derived by products which include any dramatic use of the plot or characters as part of the license."

Paragraph 7 of the agreement provides: "MERCHANDISING. Publishers will share in the Net Profit amounts retained by [Rappoport] from merchandising. [Rappoport] will have the exclusive right to merchandise material from the Programs. [Rappoport] will retain a 30% fee, plus normal and reasonable expenses related to the merchandising, and pay fifty percent (50%) of the remainder, which is considered Net Profits, to the Publishers. Such amounts shall be accounted for and paid to Publishers within a reasonable period of time, not to exceed six (6) months after receipt of these amounts by [Rappoport]. [¶] Publishers and [Rappoport] hereby acknowledge and agree that Publishers will participate in Net Profits generated from merchandising of products (as defined in this paragraph 7) derived from characters created solely by [Rappoport], only if such products are marketed and sold (i) as part of a package of merchandise or products also including characters original to the Publishers (Grandma, Grandpa or Cousin Mel), or (ii) using the title 'Grandma Got Run Over By A Reindeer' in the marketing or packaging. Publishers will not participate in Net Profits from merchandising of products created solely by [Rappoport] if such products contain only characters created solely by [Rappoport], and the title 'Grandma Got Run Over By A Reindeer' is not used in marketing or packaging."

The exclusive rights would be terminated if (1) Rappoport did not complete and deliver a production for broadcast within two years or (2) the program was not aired within a two year period after the initial broadcast. At the time the agreement was executed, Rappoport interpreted the agreement to provide exclusive rights to merchandise material from its dramatization of the song, including the song and the characters referenced therein. The Publishers and ICG did not interpret the agreement as providing exclusive merchandising rights to Rappoport.

Post-Contract Conduct

Dan-Dee International, Ltd. produces stuffed toys. In 1997, Dan-Dee contacted the Publishers concerning licensing the song for use with a generic stuffed reindeer toy. Rappoport exercised its option in 1998 and initiated the exclusive rights period. Dan-Dee's negotiations with the parties for licensing rights were unsuccessful. Rappoport and the Publishers disagreed about the scope of the merchandising rights granted to Rappoport. Dan-Dee began selling a stuffed reindeer toy that played a portion of the song without obtaining authorization from the Publishers, in reliance on the compulsory license provisions of federal copyright law.[2] In October 1999, Shropshire and Dan-Dee entered into a licensing agreement. Shropshire granted Dan-Dee the right to use his recorded version of the song in the stuffed toys. Dan-Dee remained obligated to obtain a license from the Publishers or establish that Dan-Dee's activity came within the compulsory license exception.

Rappoport completed an animated program based on the song in May 2000. The program features several reindeer characters with speaking parts. The song plays during various scenes. The program was broadcast on May 24, 2000, on the Odyssey Network. Rappoport and Warner Home Video entered into an agreement, whereby Warner agreed

---

[2] Under certain circumstances, federal copyright law compels a copyright owner to license a song for mechanical reproduction upon payment of a statutory fee. (17 U.S.C. § 115.)

to distribute a slightly different version of the program on home video. The home video version was broadcast twice in Canada.

PROCEDURAL BACKGROUND

On October 6, 1999, Rappoport filed a complaint against the Publishers for injunctive and declaratory relief.[3] Rappoport sought a declaration that: (1) it had the exclusive rights to merchandise the song, including characters from the song and the program, for use in connection with any and all types of products; (2) it's exclusive rights included the exclusive right to merchandise a stuffed reindeer toy capable of playing the song; and (3) any consideration earned by the Publishers for their merchandising of the song belonged to Rappoport.

A four-day court trial began on April 27, 2001. On August 31, 2001, the trial court issued a detailed statement of decision. On November 1, 2001, the trial court entered its judgment, stating in pertinent part, "The language of the Agreement is ambiguous as to the issue of the extent of the exclusivity as to merchandising products (as opposed to mechanical, synchronization or other royalty rights) derived from the Song. The parties each had a different intent and understanding of the meaning of the Agreement's provisions as to that issue at the time they signed the Agreement." "Paragraph 7 of the Agreement provides, in pertinent part, that [Rappoport] 'will have the exclusive right to merchandise material from the Programs.' That right belongs to [Rappoport] and encompasses any products that consist of or contain any depiction of a

---

[3] Rappoport also named Dan-Dee as a defendant. Dan-Dee claimed its rights were based on the compulsory license provisions of the federal Copyright Act. Rappoport dismissed its claims against Dan-Dee and filed a complaint against Dan-Dee in federal court. In the federal court action, Rappoport obtained a final judgment against Dan-Dee that the stuffed reindeer toy did not qualify as a "phonorecord" under Title 17 U.S.C. section 115 and therefore was not the proper subject of a compulsory license under the Copyright Act.

character (whether originally referenced in the Song or newly created by [Rappoport] especially for the television show) that is actually included in a Program created pursuant to the terms of the Agreement." (Internal underlining omitted.) "With respect to the right to merchandise any products not covered by paragraph 5 of this Judgment which contain depictions of the Song's characters or entities (such as a reindeer) used in combination with a recording of the Song or its title (hereinafter 'Other Products'), subject to the Parties entering into a further written agreement, the right to merchandise Other Products shall be equally controlled by the Parties as will the net profits from the merchandising of such Other Products." (Internal brackets and underlying omitted.) The judgment set forth a detailed system for sharing the merchandising rights for other products. The trial court found no party was a prevailing party. On December 27, 2001, Rappoport filed a timely notice of appeal. On January 17, 2002, the Publishers filed a cross-appeal.

DISCUSSION

Standard of Review

Our Supreme Court long ago established "[t]he interpretation of a written instrument, even though it involves what might properly be called questions of fact [citation], is essentially a judicial function to be exercised according to the generally accepted canons of interpretation so that the purposes of the instrument may be given effect. (See Civ. Code, §§ 1635-1661; Code Civ. Proc., §§ 1856-1866.) . . . It is therefore solely a judicial function to interpret a written instrument unless the interpretation turns upon the credibility of extrinsic evidence." (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865.) The question must be decided de novo by this court, unless the interpretation depends upon extrinsic evidence. (*Home Federal Savings & Loan Assn. v. Ramos* (1991) 229 Cal.App.3d 1609, 1613; *Broffman v.*

Newman (1989) 213 Cal.App.3d 252, 257.) "'[I]t is only when the foundational extrinsic evidence is in conflict that the appellate court gives weight to anything other than its de novo interpretation of the parties' agreement.'" (*Medical Operations Management, Inc. v. National Health Laboratories, Inc.* (1986) 176 Cal.App.3d 886, 891, citing *Garcia v. Truck Ins. Exchange* (1984) 36 Cal.3d 426,439.)

"When the interpretation turns on a credibility determination, interpretation becomes a question of fact. [Citation.] When the contract is unambiguous, an appellate court is not bound by the trial court's interpretation of the contract. [Citations.] However, when the meaning of a contract is uncertain, and contradictory evidence is introduced to aid in the interpretation, the question of meaning is one of fact properly assigned to the [finder of fact] and its findings should not be disturbed by the appellate tribunal. [Citation.] [¶] Under the parol evidence rule, extrinsic evidence is not admissible to contradict express terms in a written contract or to explain what the agreement was. [Citation.] The agreement is the writing itself. [Citation.] Parol evidence may be admitted to explain the meaning of a writing when the meaning urged is one to which the written contract term is reasonably susceptible or when the contract is ambiguous. [Citations.] Parol evidence cannot, however, be admitted to show intention independent of an unambiguous written instrument." (*Sunniland Fruit, Inc. v. Verni* (1991) 233 Cal.App.3d 892, 898.)

"The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed." (Civ. Code, § 1644.) "We interpret the intent and scope of the agreement by focusing on the usual and ordinary meaning of the language used and the circumstances under which the agreement was made." (*Lloyd's Underwriters v. Craig & Rush, Inc.* (1994) 26 Cal.App.4th 1194, 1197-1198.)

"A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties." (Civ. Code, § 1643.) "A contract must receive such interpretation as will make it reasonable." (*Beverly Hills Oil Co. v. Beverly Hills Unified Sch. Dist.* (1968) 264 Cal.App.2d 603, 609.) "Moreover, where one construction would make a contract unusual and extraordinary and another construction, equally consistent with the language employed, would make it reasonable, fair, and just, the latter construction must prevail." (*Sayble v. Feinman* (1978) 76 Cal.App.3d 509, 513.) "The court must avoid an interpretation which will make a contract extraordinary, harsh, unjust, or inequitable." (*Strong v. Theis* (1986) 187 Cal.App.3d 913, 920.)

"In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist." (Civ. Code, § 1654.) Where the language in a contract is ambiguous, the contract should be interpreted most strongly against the party who prepared it. (*Estate of Rule* (1944) 25 Cal.2d 1, 13; *Burr & Ladd, Inc. v. Marlett* (1964) 230 Cal.App.2d 468, 474; *Kanner v. National Phoenix Industries, Inc.* (1962) 203 Cal.App.2d 757.) However, "this canon applies only as a tie breaker, when other canons fail to dispel uncertainty." (*Pacific Gas & Electric Co. v. Superior Court* (1993) 15 Cal.App.4th 576, 596.)

<u>Contract Interpretation</u>

Rappoport contends the contract unambiguously gives it the exclusive right to merchandise material from the program, which includes the song and its characters, and therefore, Rappoport has the exclusive right to merchandise the song. The Publishers contend the contract does not give Rappoport the exclusive right to merchandise the song. We agree with the Publishers that the contract is unambiguous and does not provide Rappoport the exclusive right to merchandise the song.

Paragraph 3 of the agreement provides Rappoport "the exclusive dramatic rights and synchronization license" to the song for audio/visual programs based on the song. Paragraph 3 permits the Publishers to enter into other types of licensing agreements, except for licensing of products "which include any dramatic use of the plot or characters as part of the license." This provision is not ambiguous. The Publishers are prohibited from licensing the song for use in products that require a dramatic use of the plot or characters as part of the license. Dramatic means "of or relating to the drama." (Webster's 10th Collegiate Dict. (1995) p. 351.) This prohibition concerns licensing the dramatic content of the song as part of the license. Paragraph 3 does not provide Rappoport with the exclusive right to merchandise the song; it provides Rappoport with the exclusive right to dramatize the song and prohibits the Publishers from licensing other products that dramatize the song by using the plot or characters as part of the license.

Paragraph 3 does not prevent the Publishers from licensing the song for a product such as the Dan-Dee reindeer toy. Dan-Dee sought a license to use the song in its toy. Dan-Dee did not need a license from the Publishers to make a generic reindeer toy. Therefore, the license granted by the Publishers would have permitted Dan-Dee to use the song in its generic reindeer toy. Dan-Dee's reindeer toy was not a product which included a dramatic use of a character as part of the license. Under the parties' agreement, the Publishers retained the right to license the song and receive royalties for such a product.

Paragraph 7 of the agreement is also unambiguous. Paragraph 7 provides Rappoport with "the exclusive right to merchandise material from the Programs." It does not additionally expressly provide Rappoport the exclusive right to merchandise the song or material from the song. The common sense interpretation of this provision is that Rappoport has the exclusive right to license products based on material created for and originating in the programs, but not the song or material originating in the song. Rappoport's exclusive merchandising right would include characters created solely by Rappoport, as well as Rappoport's depictions of the characters from the song. However, it would not extend to all material from the song simply because the song and its characters were used in the program. Rappoport's boot-strapping interpretation, namely, that the use of the song in the program gave Rappoport the exclusive rights to merchandise the song, would be an unusual and extraordinary interpretation of the agreement. It would be unreasonable to find that through Rappoport's licensed use of the song for a dramatic program, it obtained additional merchandise rights to the song.

The merchandising rights for material created for the program and material originating in the song were heavily negotiated between the parties. As a result of these negotiations, the agreement carefully distinguishes between material from the program and the song. For example, the profit participation provision expressly differentiates between merchandise derived from characters created by Rappoport and characters originating with the Publishers. The Publishers were not entitled to share in revenue from merchandise based on characters created solely by Rappoport unless the products were "marketed and sold (i) as part of a package of merchandise or products also including characters original to the Publishers (Grandma, Grandpa or Cousin Mel), or (ii) using the title 'Grandma Got Run Over By A Reindeer' in the marketing or packaging." As part of the same paragraph, the agreement grants Rappoport merchandising rights to the program, but does not expressly grant Rappoport merchandising rights to the song or to material original to the Publishers. This omission supports our interpretation that the Publishers did not grant Rappoport merchandising rights to the song.

Under this commonsense interpretation of the agreement, Rappoport did not have the exclusive right to license the song for a generic reindeer toy. Dan-Dee's generic reindeer character was unrelated to material created for and originating in Rappoport's program. Therefore, the Publishers had the right to license the song for use in Dan-Dee's generic reindeer toy.

It is clear that the Publishers did not give Rappoport the right to control all merchandising of the song. The agreement prevents the Publishers from licensing the song for other products dramatizing the song and merchandising material created for Rappoport's program. However, the agreement does not prevent the Publishers from licensing the song for use with generic merchandise that might compete with Rappoport's program-specific merchandise.

Based on the above discussion, Rappoport's request for a declaration that it had the exclusive rights to merchandise the song, including characters from the song and the program, for use in connection with any and all types of products must be denied. Similarly, Rappoport's request for a declaration that it had the exclusive right to merchandise a stuffed reindeer toy capable of playing the song must be denied. Judgment must be entered in favor of the Publishers.

DISPOSITION

The judgment is reversed. The trial court is directed to enter a new and different judgment in favor of defendants Ellyn Trigg, individually and as the representative of the Estate of Bill Trigg (both doing business as Kris Publishing), and Elmo Shropshire, individually and doing business as Elmo Publishing. Defendants Ellyn Trigg, individually and as the representative of the Estate of Bill Trigg (both doing business as Kris Publishing), and Elmo Shropshire, individually and doing business as Elmo Publishing, are awarded their costs on appeal.

NOT TO BE PUBLISHED.

GRIGNON, J.

We concur:

TURNER, P. J.

ARMSTRONG, J.